



Capital defendants are rarely spoken of positively in the media. But journalists can be a critical ally to capital defendants. The way in which the media speak about people sentenced to death influences public opinion and can have an impact on how governments treat those accused of capital crimes. Journalists have the means to inform readers, fuel public debate, and to promote the rights of those within the criminal justice system. Where resources allow, journalists also have the means to investigate the conditions under which people are sentenced to death and to bring to light violations of their human rights. One such violation is denial of a defendant's access to counsel.

This factsheet aims to explain why the media should care about capital defendants' access to counsel, the international law framework underpinning this human right, and the ways that journalists speak about access to counsel in capital cases.

Access to a trained counsel is paramount in capital cases

Access to effective and trained legal representation can be the difference between life and death for capital defendants. One of the most basic tenets of criminal justice systems around the world is that accused persons are innocent until proven guilty. Without legal representation, though, capital defendants struggle to defend themselves against the state's charges. Defence lawyers are necessities, not luxuries, in these proceedings.¹ Indeed, the African Court on Human and Peoples' Rights has noted that the essence of legal representation is to "ensure a fair judicial process and avoid the possibility of miscarriage of justice."² A capital defendant's access to effective legal representation at all stages of proceedings is therefore paramount.

International law protects all defendants' right to a fair trial.³ Capital defendants need legal representation to ensure that this right is adequately protected. Most capital defendants do not have a detailed understanding of the laws under which they are tried, either procedural or substantive. Without this understanding, they cannot defend themselves, appeal their convictions or sentences, or ensure that they are fairly treated by the state. Moreover, access to counsel is necessary to counterbalance the resources that the state invests in prosecutions. Governments devote considerable resources to try capital defendants and prosecution lawyers are deemed essential to protect the public's interest in an orderly and just society.⁴ Yet almost

¹ Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Here, the Supreme Court of the United States held that indigent criminal defendants who are charged with a felony have the right to counsel, noting that "lawyers in criminal courts are necessities, not luxuries."

² Onyango v. The Republic of Tanzania, App. 006/2013, Afr. Ct. H.P.R., ¶ 182 (18 Mar. 2016).

³ See ICCPR Article 7 etc.

⁴ See Gideon v. Wainwright, *supra* note 1, at 344.

all capital defendants cannot afford counsel to protect their own interests and rights.⁵ It is for these reasons that international law and most domestic systems safeguard all capital defendants' right to counsel, at least at trial.

The right to counsel is rendered empty if counsel's representation is not effective. In adversarial systems of criminal justice in particular, effective legal representation is the cornerstone of ensuring a defendant's right to a fair trial. The nature of the trial setting, which depends on contesting presentations by both prosecution and defence to arrive at fair and accurate results, means that any defendant who does not have access to counsel to make a strong presentation of their case cannot be assured a fair trial.⁶

Our family sold their few possessions in order to hire counsel to represent us. However, before the day of trial, he absconded and we faced trial without counsel. We were convicted for a crime that we did not commit and served 21 years in prison.

We attempted to appeal, but without counsel, our appeal was never heard. When we finally obtained counsel through the resentencing project, we were able to present, for the first time, the true evidence of the facts of our case.

His assistance made all the difference to us and we are finally home with our families.



John Nthara and Jamu Banda (with Officer Dzinyemba) leaving prison. Photo provided by John Nthara and Jamu Banda.

– John Nthara and Jamu Banda, Malawi

In the pre-trial phase, the assistance of counsel enables a capital defendant to protect their rights and begin to prepare their defence.⁷ For defendants who are detained, the assistance of counsel enables them to challenge their detention and to safeguard against ill-treatment.⁸ In the trial phase, counsel's zealous advocacy is essential to the presentation of the defendant's case, to contesting the prosecution's narrative, and to protecting the defendant. Beyond trial, counsel serves a similar advocative and protective role. These rationales apply in any criminal case, but are critical in a capital case. A defendant's access to counsel to understand the charges brought against them, navigate the legal system, and adequately defend themselves is all the more important when the defendant's very life is at stake.

International law protects capital defendants' right to counsel

All capital defendants have the right to access counsel. Most international and regional human rights instruments provide for the right to legal representation in criminal proceedings as part

⁵ Capital Punishment in Context, *Representation in Capital Cases* (last visited 20 May 2020) <https://capitalpunishmentincontext.org/issues/representation>; Death Penalty Information Center, *Representation* (last visited 20 May 2020) <https://deathpenaltyinfo.org/policy-issues/death-penalty-representation>.

⁶ *Gideon v. Wainwright*, *supra* note 1, at 344.

⁷ See Amnesty International, *Fair Trial Manual, Second Edition*, 43 (2014).

⁸ *Id.*

of the right to a fair trial.⁹ For example, Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that every person is entitled “to defend himself in person or through legal assistance of his own choosing . . . and to have legal assistance assigned to him, in any case where the interests of justice so require.” Article 7(1)(c) of the African Charter on Human and Peoples’ Rights (ACHPR) similarly guarantees a defendant’s right to a defence.

International, regional, and national bodies have found that the right to counsel encompasses the right to effective and substantial counsel. A prerequisite of effective counsel is that counsel must be independent and free to advocate on behalf of their client. This is complicated by government control over the legal profession, as is the case in Saudi Arabia.¹⁰ In addition, a state’s mere appointment of a defence lawyer is not sufficient to guarantee that the defendant receives effective assistance.¹¹ Rather, the right to effective counsel requires defence lawyers to have access to all of the resources needed to carry out their role.¹² This means that defence lawyers must prepare a defence¹³ and must have adequate time and facilities to prepare this defence.¹⁴ These obligations are critical in death penalty cases.¹⁵

What constitutes adequate time and facilities depends on the circumstances of the case. By their very nature, capital cases are complex and demanding, requiring time to prepare. Defence lawyers must also have the requisite experience to handle a capital case. In spite of these international legal obligations, some capital defendants are represented by lawyers who are denied the resources to take on death penalty cases. A study in the United States, for example, found that death row inmates in Texas had a one in three chance of being executed without having their case investigated by a competent attorney.¹⁶

Moreover, states must provide full and free legal assistance to indigent defendants in capital cases.¹⁷ Indigent defendants have the right to legal aid even during emergencies and armed conflict, as recognised by the Arab Charter.¹⁸ Lawyers provided by the state have the same obligations to provide effective assistance as their hired counterparts. This requirement is especially important given that many capital defendants are indigent, so receive state-appointed counsel, and given the seriousness and finality of the death penalty.

⁹ ICCPR, article 14(3)(d); Statute of the International Criminal Court, article 67(1)(d); European Convention for Human Rights (ECHR), article 6(3)(c); Charter of Fundamental Rights of the European Union, article 47; American Convention on Human Rights (ACHR), article 8(2)(d); African Charter on Human and Peoples’ Rights (ACHPR), article 7(1)(c).

¹⁰ See Amnesty International, *Affront to Justice: Death Penalty in Saudi Arabia*, 17 (2008), <https://www.amnesty.org/download/Documents/56000/mde230272008en.pdf>.

¹¹ *Artico v. Italy*, 6694/74 Eur. Ct. H.R., 13 May 1980; *Kamasinski v. Austria*, 9783/82 Eur. Ct. H.R., 19 Dec. 1989; *Daud v. Portugal*, 22600/93 Eur. Ct. H.R., 21 Apr. 1998.

¹² See, e.g., *H.C. v. Jamaica*, Comm. No. 383/1989, U.N. Doc. CCPR/C/45/D/383/1989, ¶ 6.3 (H.R.C. 28 July 1992); *Hendricks v. Guyana*, Comm. No. 838/1998, U.N. Doc. CCPR/C/75/D/838/1998, ¶ 6.4 (H.R.C. 28 Oct. 2002); *Brown v. Jamaica*, Comm. No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997, ¶ 6.6 (H.R.C. 11 May 1999).

¹³ *Diocles William v. United Republic of Tanzania*, App. No. 016/2016, Afr. Ct. H.P.R., ¶ 63 (21 Sept. 2018).

¹⁴ ICCPR, article 14(3)(b); ECHR, article 6(3)(b); ACHR, article 8(2)(c); African Commission on Human and Peoples’ Rights v. Libya, App. No. 002/2013, Judgment (Merits), ¶ 94 (6 June 2016). See also Statute of the International Criminal Court Statute, art. 67(1)(b).

¹⁵ ECOSOC Resolution 1989/64, ¶ 1(a).

¹⁶ See Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf.

¹⁷ African Commission, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ¶ H(c) (2003) [hereinafter African Commission Guidelines]. See ICCPR article 14(3)(d); Statute of the ICC, article 67(1)(d); ECHR, article 6(3)(c); Charter of Fundamental Rights of the European Union, art. 47; ACHR, article 8(2)(e); UN Basic Principles on the Role of Lawyers, 1990, ¶ 3.

¹⁸ Arab Charter Article 4(2). See also Amnesty International, *Fair Trial Manual*, *supra* note 7, at 46–47.

Capital defendants have a right to counsel during police interrogation and while in police custody. All suspects and accused persons, whether or not they are detained, should have access to counsel from the very start of a criminal investigation—from the moment that they are deprived of their liberty, including during the initial stages of a police investigation.¹⁹

Based on available information, on appeal, Mr. Fardin Hosseini's attorney denied the charges against his client, relying on legal evidence. Noting that there was absolutely no evidence tying Mr. Hosseini to the charges brought against him, [the attorney] emphasized that the testimony of Mr. Vahab Amiri, Mr. Hosseini's brother-in-law, against the latter, was obtained in the absence of a lawyer under unbearable duress and torture and was denied before the judge. Mr. Hosseini's attorney further emphasized: "My client expressly stated at Kermanshah Province Criminal Court that [his brother-in-law's] confessions contained in the case file were obtained in special circumstances, when he had been tortured, and that he had objected to said confessions that had been obtained under duress, torture, and threat of anal insertion of a bottle."

– Testimony of Fardin Hosseini, provided the Abdorrahman Boroumand Center

Such is the importance of access to counsel that when it is denied or ineffective, a capital defendant's death sentence cannot stand. Death sentences imposed where a defendant was denied their right to effective counsel are deemed arbitrary.²⁰ The African Commission has concluded that "if the particular proceedings in which the death penalty is imposed have not stringently met the highest standards of fairness, then the subsequent application of the death penalty will be considered a violation of the right to life."²¹

As representatives of the media, what can you do?

Investigating and reporting on capital defendants' access to counsel can help raise awareness of the importance of counsel to capital defendants' lives. You are in a unique position to speak out to a broad audience about violations of capital defendants' right to counsel and the life-threatening consequences of these violations.

How can you speak about this issue?

Some journalists use trials as a stimulus to speak about capital punishment as a social phenomenon. The focus of much reporting is about guilt or innocence, but a trial also represents an opportunity to speak about the representation of the defendant and their right to quality counsel. Executions, sadly, also provide a stimulus for reporting on the death penalty. Where a defendant raised claims of ineffective assistance of counsel on appeal, these can provide a way into the topic of access to counsel.

You can also conduct investigations into defendants' access to counsel at the trial, pre-trial, and post-conviction stages. Investigative journalism can shed light on custodial and trial violations that can prove helpful to capital defendants' cases. For example, the investigative

¹⁹ Barreto Leiva v. Venezuela, Inter. Am. Ct. H.R., Judgment (Merits, Reparations and Costs), ¶ 62 (17 Nov. 2009); Dayanan v. Turkey, App. No. 7377/03 Eur. Ct. H.R., ¶¶ 30–32 (2009).

²⁰ See Human Rights Committee, *General Comment No. 36: Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, U.N. Doc. CCPR/C/G/36, ¶ 41 (30 Oct. 2018). See also Ally Rajabu v. United Republic of Tanzania, App. No. 007/2015, Afr. Ct. H.P.R., ¶ 100 (28 Nov. 2019).

²¹ African Commission, *General Comment No. 3, On the African Charter On Human and Peoples' Rights: The Right to Life, Article 4*, ¶ 24 (2015).

reporting of American broadcaster APM Reports on the trials of capital defendant Curtis Flowers was essential in raising public awareness of his case before it was heard at the Supreme Court of the United States and uncovered information that was useful to Mr Flowers' appellate lawyers.²²

Where can you look for information?

Sitting in on a trial or hearing can be helpful, but gaining access a prison and meeting people sentenced to death is one of the most important things you can do when reporting on capital punishment. Getting authorisation for a prison visit can be tricky, and prison staff can make the journalistic process difficult. Nevertheless, if you are able to speak to a person sentenced to death, you should.

People on death row can tell you about the events surrounding their arrest, trial, and appeal. They can speak about the representation that they had, any instances where they were denied representation, and their relationships with their lawyers. Please bear in mind, though, that incarcerated persons may be uncomfortable speaking with you and, in fact, speaking with the media may be dangerous for them. Refer to this [factsheet on how to conduct a prison visit](#) for more information, and before visiting someone in prison.

You can also speak to lawyers directly involved in capital trials. Don't forget that many capital defenders with legal aid organisations work with very limited resources and restrictive in-country norms, making it difficult for them to provide quality representation. This should inform your reporting and interactions with legal aid lawyers.

An incarcerated person's spouse, parents, children, and friends are other good sources of information about capital defendants' access to counsel. Your encounters with family and friends can help to humanise the person incarcerated; including humanising narratives of people sentenced to death in your reporting can subdue the stereotypes around capital punishment.

Resources

Amnesty International, Fair Trial Manual, Second Edition (2014)
<https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>

Cornell Center on the Death Penalty Worldwide, Legal Representation (last updated 28 June 2012)
<https://www.deathpenaltyworldwide.org/publication/legal-representation/legal-representation-html>

Cornell Center on the Death Penalty Worldwide, Death Penalty Database (last visited 29 May 2020)
<https://dpw.pointjupiter.co/search.cfm>

²² See APM Reports, *In the Dark: Season 2*, podcast by APM Reports (2018) <https://www.apmreports.org/in-the-dark/season-two>.